

# HOW DO YOU SPELL M-U-R-K-O-W-S-K-I?

## PART I: THE QUESTION OF ASSISTANCE TO THE VOTER

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"They tell us this is impossible, you cannot do it, Alaskans can't figure out how to fill in an oval and spell M-U-R-K-O-W-S-K-I?"

—Sen. Lisa Murkowski<sup>1</sup>

### ABSTRACT

*The 2010 Alaska Senate race is now over, ending amid considerable legal controversy. After losing the Republican primary to Tea Party-backed candidate Joe Miller, Senator Lisa Murkowski staged a write-in candidacy and, bucking history, won the general election. Much attention has been paid to Miller's post-election challenges to Murkowski write-in ballots, claims which have been resolved in Murkowski's favor. Still, a major election law question emerged prior to the election: to what extent can poll workers assist voters who need help to vote for a write-in candidate? After Murkowski declared her*

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1. Sean Cockerham & Erika Bolstad, *Murkowski Says 'Let's Make History'*, ANCHORAGE DAILY NEWS, Sept. 18, 2010, <http://www.adn.com/2010/09/17/1459578/murkowski-expected-to-say-yes.html>.

*write-in candidacy, the Alaska Division of Elections distributed a list of eligible write-in candidates to polling places, in case voters had questions about how to spell the name of a write-in candidate. Both parties, sensing this would benefit Murkowski, cried foul and challenged the new policy in Alaska state court. They claimed that the Division violated its own regulations, which prohibited the distribution of "information" about write-in candidates at polling places. This article examines four issues about voter assistance in the Murkowski litigation: (1) how to interpret statutes and regulations regarding voter assistance; (2) what kind of assistance is permissible and what kind is not; (3) whether the state can legitimately limit the ability of voters to write in the name of a candidate; and (4) how decisions on assistance to voters before the election should affect a court's disposition on cases that arise after the election.*

### INTRODUCTION

Lisa Murkowski's write-in candidacy for re-election as Alaska's Senator has finally succeeded.<sup>2</sup> Early on, however, success was far from guaranteed. Faced with anti-incumbent sentiment and an early Tea Party surge, Murkowski lost the Republican primary to Joe Miller. Her candidacy was declared dead, and Murkowski herself appeared ready to throw in the towel.<sup>3</sup> Even when she campaigned as a write-in candidate there were difficulties beyond simply fighting long odds to become the first successful write-in Senate candidate since Strom Thurmond.<sup>4</sup> There was, more specifically to Ms. Murkowski, the problem of whether people would be able to successfully *spell* her name correctly on the ballot.<sup>5</sup>

That problem—and the Alaska Election Division's response to it—made up the first round of legal wrangling in the Alaska Senatorial

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2. *Miller Concedes Loss to Murkowski*, CBSNEWS.COM, Dec. 31, 2010, <http://www.cbsnews.com/stories/2010/12/31/politics/main7201772.shtml>. The final blow was dealt in Federal District Court, which dismissed all of Miller's remaining claims against the State of Alaska. *See Miller v. Treadwell*, 736 F. Supp. 2d 1240 (D. Alaska 2010) (lifting stay, resolving pending motions, and dismissing case). The Alaska Supreme Court ruled on Miller's post-election claims in *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

3. Michael Carey, *Murkowski Write-In Run Bucks History*, ANCHORAGE DAILY NEWS, Sept. 29, 2010, <http://www.adn.com/2010/09/29/1478287/murkowski-write-in-run-bucks-history.html> (recounting the history of write-in candidacies in Alaska, all of which were unsuccessful).

4. *Id.*

5. Cockerham & Bolstad, *supra* note 1.

contest.<sup>6</sup> The Alaska Election Division, mindful that an unusually high number of people would be voting write-in, sought to provide polling places a list of all eligible write-in candidates, including Lisa Murkowski.<sup>7</sup> The list, presumably, would be provided (in some fashion) to voters confused about how to spell the names of candidates. The Alaska Democratic Party filed suit (later joined by the Alaska Republican party) seeking to block use of the list.<sup>8</sup> Both parties saw the move by the Division as an obvious help to the Murkowski campaign. A state superior court held in favor of the Democratic Party.<sup>9</sup> But in late October, a per curiam decision by the Alaska Supreme Court reversed, allowing the Division to use the lists in limited circumstances.<sup>10</sup>

The questions presented by the pre-election lawsuits raise issues of enduring importance to election law, both in Alaska and throughout the United States. The Alaska Supreme Court's pre-election decision has been eclipsed by both the election itself and Miller's subsequent litigation to contest which write-in ballots should be counted.<sup>11</sup> But the issues presented by the litigation will certainly come up again, perhaps now more than ever with the surge in third-party activism.<sup>12</sup> This essay considers four questions raised by the early election litigation:

- First, how should courts read statutes regarding assistance to voters, especially when those statutes seem to clash with regulations promulgated by the election division itself?
- Second, what type of assistance should poll workers be allowed to give to voters who wish to vote for a write-in

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6. See *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054, slip op. at 4-5 (Alaska Oct. 29, 2010) (per curiam).

7. Erika Bolstad, *Parties Dispute Use of Election Write-In List*, ANCHORAGE DAILY NEWS, Oct. 26, 2010, <http://www.adn.com/2010/10/25/v-printer/1518500/parties-dispute-use-of-a-write.html>.

8. *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI (Alaska Sup. Ct. Oct. 27, 2010).

9. *Id.*

10. *Alaska Democratic Party*, No. S-14054, at 5-6.

11. Jill Burke, *Election Staff 'Changed the Rules,' Miller Now Argues*, ALASKA DISPATCH, Nov. 19, 2010, <http://alaskadispatch.com/blogs/political-animal/7576-election-staff-changed-the-rules-miller-now-argues>; Richard L. Hasen, *Alaska's Big Spelling Test: How Strong is Joe Miller's Argument Against the Leeza Markovsky Vote?*, SLATE, Nov. 11, 2010, <http://www.slate.com/id/2274556/>.

12. See, e.g., Ben McGrath, *Bloomberg, 2012?*, THE NEW YORKER, Nov. 15, 2010, at 32 (quoting Democratic consultant Joe Trippi as putting the odds of an independent candidacy for President in 2012 or 2016 at "probably sixty to seventy percent").

candidate? When does voter assistance go too far, and constitute undue influence over the voter?

- Third, to what extent can a state legitimately disadvantage a write-in candidate who has won neither party's primary? Can a state, for reasons of either principle or expediency, make it harder for voters to write in the names of candidates?
- Fourth, how should decisions regarding assistance to voters *before* they vote affect how votes are counted *after* the election? If voters were able to seek help in spelling a candidate's name on a write-in ballot, does that mean that ballots that spell the name incorrectly should not be counted?

In *State, Division of Elections v. Alaska Democratic Party*,<sup>13</sup> the Alaska Supreme Court was required to answer, or at least hint at answers, to each of these questions, save the last, which was the subject of the post-election litigation.<sup>14</sup> Generally, I agree with the court's answers. Still, the supreme court's opinion and oral arguments came under time pressure and the need to render a decision quickly so that the election could proceed. This essay attempts to clarify the arguments on both sides of each question and to justify more fully the supreme court's decision.

## I. BACKGROUND

The facts leading up to the supreme court's decision should be vaguely familiar to those who followed the 2010 elections. Joe Miller, a veteran of Operation Desert Storm who graduated from West Point and Yale Law School, won a surprising upset over Senator Lisa Murkowski in the Republican primary, thanks in part to backing by the Tea Party and the support of former Alaska Governor Sarah Palin.<sup>15</sup> His opponent, Senator Lisa Murkowski, conceded and appeared willing to accept the primary voters' verdict that she should not be a candidate in the general election.<sup>16</sup> A few days later, she changed course—based, she said, on the

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13.No. S-14054 (Alaska Oct. 29, 2010).

14. *Id.* at 3–5.

15. Sean Cockerham, *Murkowski Concedes GOP Senate Race to Miller*, ANCHORAGE DAILY NEWS, Sept. 1, 2010, <http://www.adn.com/2010/08/31/1433454/murkowski-concedes-senate-race.html>.

16. Becky Bohrer, *Write-In Option for Murkowski Poses Challenges, Opportunity*, ANCHORAGE DAILY NEWS, Sept. 10, 2010, <http://www.adn.com/2010/09/10/1447401/write-in-option-for-murkowski.html> ("Earlier this week, Murkowski

outpouring of support for her from ordinary Alaskans.<sup>17</sup> She announced that she would wage a write-in campaign, as the date for filing as an independent candidate had already passed.<sup>18</sup>

In anticipation of many voters writing in Murkowski's name—she still retained high statewide popularity, even after her primary defeat—the Alaska Division of Elections sent to polling places a written list of write-in candidates and their party affiliations, a move unprecedented in the history of Alaska elections.<sup>19</sup> At least one polling place mistakenly posted the list,<sup>20</sup> which is how the two political parties eventually

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said that upon conceding she had been ready to begin considering her future outside the Senate.”); Cockerham & Bolstad, *supra* note 1 (Miller accusing Murkowski of going back on her word that she would respect the wishes of the primary voters); *id.* (Murkowski regretting statement that she would support the winner of the Republican primary).

17. Erika Bolstad, *Murkowski Expected to Make Write-In Decision Today*, ANCHORAGE DAILY NEWS, Sept. 7, 2010, <http://www.adn.com/2010/09/16/1458000/murkowski-seriously-considering.html> (Statement of Senator Murkowski: “[I]t is people from all walks of life, every corner of the state, who are concerned about Alaska’s future and concerned enough to take action on it . . .”). Murkowski had especially strong support from the Alaska Native community. Cockerham & Bolstad, *supra* note 1 (co-chair of Alaska Federation of Natives promising that the Alaska Native Community “will be there” for Murkowski).

18. Cockerham & Bolstad, *supra* note 1; Sean Cockerham, *Murkowski: Wait Until the Absentees are Counted Before Writing Her Off*, ADN.COM ALASKA POL. BLOG (Aug. 25, 2010), <http://community.adn.com/node/152897> (after primary, too late for filing an independent candidacy); Sean Cockerham, *Murkowski Supporters: Come to “Campaign Kickoff” Tonight*, ADN.COM ALASKA POL. BLOG (Sept. 17, 2010), <http://community.adn.com/adn/node/153185> (announcing write-in candidacy). Murkowski apparently briefly flirted with running as a libertarian candidate. Bohrer, *supra* note 16 (citing pollster predicting that if Murkowski stayed in the race, she would run on the libertarian ticket).

19. Hans A. von Spakovsky, *The Justice Department Goes to Alaska*, NATIONAL REVIEW ONLINE: THE CORNER (Oct. 31, 2010), <http://www.nationalreview.com/corner/251626/justice-department-goes-alaska-hans-von-spakovsky> (“[T]he Election Division has never provided a list of write-in candidates in any election in the past.”).

20. Erika Bolstad, *Supreme Court Allows State to Provide Write-In List*, ANCHORAGE DAILY NEWS, Oct. 28, 2010, <http://www.adn.com/2010/10/27/1521270/judge-blocks-distribution-of-write.html> (“The Division of Elections has been providing early voters who ask for assistance a list of all write-in candidates, and in one case actually posted the list at an early-voting location in Homer.”); *see also* Letter from Paul Higgins to Gail Fenumiai (Oct. 19, 2010), available at <https://www.sarahwatch.org/news/press-releases?start=10> (“It has come to the attention of the Alaska Democratic Party (ADP) that at least one early vote polling location has posted a list of write-in candidates in the voting booths.”).

learned of its existence.<sup>21</sup> The Division also wrote to the United States Department of Justice (D.O.J.) asking for preclearance of its actions because under the Federal Voting Rights Act, Alaska is required to submit all major election changes to the D.O.J. for approval.<sup>22</sup> In its letter, the Division said it was not sure whether the change was significant enough to require preclearance but thought it should err on the side of caution.<sup>23</sup> In a reply a few days later, the D.O.J. provisionally approved the measure.<sup>24</sup>

The two major parties did not respond so amiably. The parties saw providing a list of write-in candidates to polling places as a move which plainly favored the write-in candidate with the hard-to-spell name: Murkowski.<sup>25</sup> The Democratic Party, joined by the Republicans,<sup>26</sup> filed

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21. *Alaska Democratic Party v. Fenumiai*, No 3AN-10-11621CI, slip op. at 3 (Alaska Sup. Ct. Oct. 27, 2010).

22. Letter from Margaret Paton-Walsh, Assistant Attorney Gen., State of Alaska, to Chris Herren, Voting Section Chief, Civil Rights Div., U.S. Dep't of Justice (Oct. 15, 2010); see generally Civil Rights Div., *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUST., [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited Mar. 4, 2011) (Alaska is a covered jurisdiction under Section 5 of the Voting Rights Act). For an excellent recent history of Alaska under the Voting Rights Act, see Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 120–21 (2007) (describing the preclearance process in Alaska).

23. See Letter from Margaret Paton-Walsh, *supra* note 22, at 1.

24. Because the Division's compliance with the Voting Rights Act (V.R.A.) was not at issue in the Alaska Supreme Court in regard to the V.R.A. decision, I do not discuss it here. For a critical assessment of the Division's actions, see von Spakovsky, *supra* note 19 (claiming that both the Division of Elections in Alaska and the D.O.J. behaved wrongly with regard to the change in practice).

25. See von Spakovsky, *supra* note 19. Although the write-in list would surely benefit Murkowski, the Murkowski campaign denied that it had requested such a list be available to voters. Erika Bolstad, *Court OKs Limited Access to Write-In List*, ANCHORAGE DAILY NEWS, Oct. 30, 2010, <http://www.adn.com/2010/10/29/1525676/alaska-supreme-court-weighing.html>. The Murkowski campaign did seek clarification in September 2010 over what would count as an acceptable write-in vote for Murkowski. *Murkowski Seeks Clarification on Election Write-In Criteria*, ANCHORAGE DAILY NEWS, Sept. 25, 2010, <http://www.adn.com/2010/09/24/1470302/murkowski-seeks-clarification.html>. There is of course also the broader—non-partisan—interest in having rules that are clear prior to the election, and not changing those rules in the middle of an election contest. See Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in *THE VOTE* 103–04 (Cass Sunstein & Richard Epstein eds., 2001) (discussing how legislatures devise rules for elections appropriately behind a “veil of ignorance” about who will benefit from them). A version of this argument was made by the attorneys for both the Democratic and Republican Parties. Oral Argument at 31:00, 59:00, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) (noting potential unfairness of change from past practices of the Division of Elections).

suit in Alaska state court.<sup>27</sup> They alleged that the Division was violating its own regulations, which prohibited any “information” about write-in candidates to be available, posted, or discussed within a polling place.<sup>28</sup> The Division replied that it was complying with its statutory mandate to provide voter assistance.<sup>29</sup> The Murkowski campaign intervened on the side of the Division.<sup>30</sup>

Judge Frank Pfiffner of the Alaska Superior Court granted the Democratic Party’s request for a temporary restraining order enjoining the Division of Elections’s distribution of a list of names of write-in candidates to polling places.<sup>31</sup> In a thirteen-page opinion, Judge Pfiffner found that the Alaska Division of Elections’s regulation prohibiting the dissemination of information regarding write-in candidates was clear and that the Division’s interpretation that their list of candidates was not information was “simply wrong.”<sup>32</sup> Judge Pfiffner also rejected the Division’s argument that its statutory obligation to assist “qualified voters” trumped the regulation banning information about write-in candidates.<sup>33</sup> Assisting voters in voting was different, Pfiffner reasoned, than providing them with information about whom they could vote for.<sup>34</sup> If such assistance were truly necessary, “then the Division has been asleep at the switch for the past 50 years.”<sup>35</sup>

The victory of the Alaska Democratic Party was short-lived. The Alaska Supreme Court stayed the superior court’s order and granted the Division’s motion for expedited consideration.<sup>36</sup> In an opinion released just days before the general election, the court ruled unanimously against the Democratic Party, who had again been joined by the Alaska

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26. *Alaska Democrats, Republicans File Suit Over Write-In List*, KTUU NEWS.COM (Oct. 26, 2010), <http://www.ktuu.com/news/ktuu-democrats-republicans-sue-write-in-list-102510,0,179573.story>.

27. *See Fenumiai*, No. 3AN-10-11621CI, at 3.

28. *Id.*

29. Defendant’s Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI (Alaska Sup. Ct. Oct. 27, 2010).

30. *Fenumiai*, No. 3AN-10-11621CI, at 3. The Alaska Federation of Natives also sided with the Division and the Murkowski campaign. *Id.* at 4.

31. *Id.* at 2; Joshua Saul, *Write-In Lists Ruled a Violation of Election Law*, ALASKA DISPATCH, Oct. 27, 2010, <http://alaskadispatch.com/blogs/political-animal/7294-write-in-lists-ruled-a-violation-of-election-law>.

32. *Fenumiai*, No. 3AN-10-11621CI, at 7.

33. *Id.* at 9–10.

34. *Id.* at 10.

35. *Id.*

36. *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054, slip op. at 2 (Alaska Oct. 29, 2010) (the court acted to “avoid disruption at the polls”).

Republicans.<sup>37</sup> The court sided with the Division, stating that its decision was generally informed by Alaska's case law, which emphasized the importance of "facilitating voter intent."<sup>38</sup> More particularly, the court read the regulation that restricted disseminating information about write-in candidates against the Alaska statute which charged the Division with assisting voters.<sup>39</sup> The statute, in the court's mind, should trump—even if (or especially if) the regulation clearly conflicted with the statute.<sup>40</sup>

Accordingly, the court allowed the list of write-in candidates to be available for poll workers to give to voters provided that its use was "tailored to a voter's request for specific assistance" in voting.<sup>41</sup> The court further held that the list should include only the names of the write-in candidates, not their party affiliations.<sup>42</sup> By this time, the list had swelled to over 150 candidates (from a one-page list to an eight-page list<sup>43</sup>), a fact which might have assuaged the court's worries that the document would influence voters. With so many names, the voter would have to come in with some idea of the candidate's name he or she was looking for; accordingly, the list would be less likely to favor any single candidate.<sup>44</sup>

The debate over voter assistance seemed to be over, although the Miller campaign filed one more lawsuit in federal court, claiming that

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37. *See id.*

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 5–6.

42. *Id.* Although the court did not discuss its reasons for excluding party affiliation, it may have been because the designation of Lisa Murkowski as a "Republican" might be controversial: she was not, after all, the Republican nominee. *See* Oral Argument at 24:40, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) (discussing whether or not to include party affiliation on write-in list, given that write-in candidates have not won any party's primary). *But c.f.* *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458–59 (2008) (upholding the Washington primary process in which candidates can choose the party label they wish to have shown on the ballot).

43. *See* Kyle Hopkins, *Senate Write-In Candidates Flood Division of Elections*, ADN.COM ALASKA POL. BLOG (Oct. 28, 2010), <http://community.adn.com/node/154002> (mass registration designed to "make it harder for voters to find Murkowski's name"); Bolstad, *supra* note 7 (list had over 150 candidates due to the urgings of an Anchorage disc jockey).

44. Oral Argument at 39:30, 58:50, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) (demonstrating that justices wondered how a list of over 150 people could be "persuasive" or influence voters).



the supreme court's order represented an unprecleared change in Alaskan voting procedures.<sup>45</sup> The Division quickly requested and received final approval from the D.O.J.<sup>46</sup> By this time, the campaigns were shifting their attention to the election and the next round of litigation: Miller's challenge to write-in ballots that had incorrectly spelled "Murkowski."<sup>47</sup>

## II. WHAT INTERPRETATION? WHICH STANDARD?

The first issue before the Alaska courts was reconciling the apparent conflict between the regulation prohibiting write-in candidate information and the Division's subsequent decision to allow poll workers to show voters a list of eligible write-in candidates. If the two were in conflict, which should yield? And if one should yield, which interpretive principle should guide that decision? The superior court held that the regulation governed, despite the Division's contrary practice, because the regulation's directive was unambiguous.<sup>48</sup> The supreme court, by contrast, agreed with the Division and held that the Division was acting faithfully in accordance with its broader statutory mandate to assist voters.<sup>49</sup>

The regulation at issue stated that "information regarding a write-in candidate may not be discussed, exhibited, or provided at the polling place, or within 200 feet of any entrance to the polling place, on election day."<sup>50</sup> The Alaska Democratic Party, as well as the Alaska superior court, read "information" as meaning *any* information, and as such, it included the list that was given to the poll workers to show—in

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45. See *Miller v. Campbell*, No. 3:10-cv-0252-RRB, 2010 U.S. Dist. LEXIS 133443 (D. Alaska Nov. 19, 2010).

46. See *Alaska Write-In Changes, Precleared Lickety-Split*, ELECTION LAW CENTER, (Nov. 1, 2010), <http://electionlawcenter.com/2010/11/01/alaska-writein-changes-precured-licketysplit.aspx> ("That sure didn't take long. The D precleared the changes implemented by the Alaska Supreme Court last friday [sic] regarding the write-in process. An efficient write-in process is expected to help Lisa Murkowski.").

47. E.g., Kyle Hopkins, *Miller Sues Over Spelling, Gains Votes in Absentee Ballot Count*, ANCHORAGE DAILY NEWS, Nov. 9, 2010, <http://www.adn.com/2010/11/09/1545716/miller-sues-to-force-exact-spelling.html>.

48. *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI, slip op. at 7 (Alaska Sup. Ct. Oct. 27, 2010).

49. *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054, slip op. at 4 (Alaska Oct. 29, 2010).

50. ALASKA ADMIN. CODE tit. 6 § 25.070(b) (2010).

appropriate circumstances—to voters.<sup>51</sup> Clearly, “information” meant *at least* that no signs or placards explicitly advertising a write-in candidate could be displayed at the polling place or that supporters could electioneer at the polling place, things that would presumably also be prohibited for the major party candidates.<sup>52</sup> Thus, when a poll worker posted the list of write-in candidates at the polling place, this ran afoul of the restriction (and the Division of Election never defended the position that the list should have been posted).<sup>53</sup> The question was how far the regulation prohibiting information about write-in candidates extended past this. Did it mean that poll workers could not have the list and show it to voters who requested assistance in spelling the name of a candidate?

In answering this question, the Division of Elections proposed distinguishing between *mere* information, such as the information regarding write-in candidates on the list, and *persuasive* information, such as signs or placards advocating for one particular write-in candidate—that is, electioneering materials.<sup>54</sup> Yet, such a distinction does not necessarily explain the Division’s decision not to *post* the list, and instead allow poll workers to supply people with the list. For we might wonder how a sign posted on the wall with the names of write-in candidates could conceivably persuade a voter to vote for a write-in

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51. See *Fenumiai*, No. 3AN-10-11621CI, at 7.

52. See ALASKA STAT. § 15.56.016 (2010) (defining “campaign misconduct in the first degree” as when a person “circulates cards, handbills, or marked ballots, or posts political signs or posters relating to a candidate at an election or election proposition or question”); see also § 15.15.160 (prohibiting discussion of any political party or candidate by an election board official while the polls are open); § 15.15.170 (“During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question.”).

53. The Division of Elections conceded that posting the list was contrary to its intention, and the sign that was posted in a Homer polling place was quickly removed. See Letter of Gail Fenumiai, Dir., Div. of Elections, to Patti Higgins, Chair, Alaska Democratic Party (Oct. 20, 2010).

54. Defendant’s Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction at 18–19, *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI (Alaska Sup. Ct. Oct. 27, 2010) (asserting that the prohibition against “information” in title 6, section 25.070(b) of the Alaska Administrative Code is directed against “*persuasive information*” about write-in candidates, which the list of certified candidates is not); see also Oral Argument at 38:00, 1:08:30, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010). The distinction between persuasive information and mere information was also mentioned by a justice at oral argument. Oral Argument at 38:00, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010).

candidate when he or she previously had no intention of doing so. Does the posting of the sign change the list's fundamental nature from being merely informative to being persuasive? Couldn't a posted list merely inform?

But if posting a list is in fact persuasive, then wouldn't the same list *also* be persuasive when provided by a poll worker? This indeed is exactly what worried the superior court.<sup>55</sup> No longer were election workers merely helping voters with the mechanics of voting, the superior court reasoned, they were instead giving voters new information. Such a concern may have also motivated the Division of Election's own warning in its handbook for poll workers: "The election board must not discuss write-in candidates with voters. If a voter asks how to vote for a write-in refer the voter to the instructions on the power in the voting booth or the sample ballot."<sup>56</sup> Mechanics of voting might be discussed under the regulation, but not particular write-in candidates for fear of influencing the voter in the direction of a particular candidate.

But the superior court largely abstracted from the possible policy reasons for the restriction on discussions of "information" about the candidates and instead rested its opinion mainly on the fact that the regulation itself made such a clear statement: "no information" meant no information. In the face of such perceived clarity, the superior court felt constrained. It could not credit the Division of Election's new and unprecedented policy, given on the fly in the middle of an election.<sup>57</sup> If the Division doubted the wisdom of its previous policy, it needed to have a new round of public notice-and-comment rulemaking.<sup>58</sup> This is precisely what it did not do with the distribution of the (ever-changing)

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55. *Fenumiai*, No. 3AN-10-11621CI, at 10 ("The Division's list prompts voters on who to vote for; it doesn't provide assistance in actually voting. . . . [P]roviding voters with a list of write-in candidates smacks of electioneering at the polls."); *see also* Alaska Democratic Party's Opposition to Petition for Review at 11, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) ("Assisting with how to cast a write-in vote is markedly different than providing a list of the names of who can be written in.").

56. Alaska Republican Party's Opposition to Petition for Review, State, Div. of Elections v. Alaska Democratic Party, No. S-14054, (Alaska Oct. 29, 2010) (Exhibit E).

57. *Fenumiai*, No. 3AN-10-11621CI, at 7 ("[A]n agency's new, last minute interpretation of a regulation is not entitled to deference.").

58. von Spakovsky, *supra* note 19 ("No one's saying the regulation can't be changed. But if the Division wants to change it, it should follow the procedures laid out in the Alaska Administrative [Procedure] Act: proposing a new regulation, taking public comments, and only then changing the law."); *see also* ALASKA STAT. § 44.62.190(a)(1) (2010) (describing the Administrative Procedure Act guidelines for promulgating or amending a regulation).

list of write-in candidates, an argument advanced by Murkowski's opponents at several points in the litigation.<sup>59</sup>

The Alaska Supreme Court spent little time on the question of what the appropriate interpretation of the Division's regulation was, although it did note that a deferential standard of review should usually apply to the Division's interpretation because "the agency is best able to discern its intent in promulgating the regulation at issue."<sup>60</sup> Rather, the supreme court focused on the principle that if a regulation conflicts with a statute, the regulation simply must yield.<sup>61</sup> Here, the statute was the broadly worded section 15.15.240 of the Alaska Statutes stating that if a voter requests assistance, the Division "shall assist the voter."<sup>62</sup> The court held that there would be some circumstances where providing the list of candidates would be "necessary to address a voter's request for assistance."<sup>63</sup>

The court also ruled that the list could not include the party affiliation of the candidate, saying that it was not information that would be necessary to address a voter's request for assistance (something that the Murkowski campaign had conceded was not necessary at oral argument).<sup>64</sup> In short, the supreme court ignored the regulation, or better, thought the regulation inconsequential given the statutory mandate to assist voters.

For the supreme court, then, this case presented a straightforward issue of interpreting the statutory definition of "voter assistance." But the supreme court also cited several rules of interpretation specific to election laws. These rules belong to what Richard Hasen has called the "democracy canon."<sup>65</sup> According to the canon, election laws should be

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59. See, e.g., Alaska Democratic Party's Opposition to Petition for Review at 10, No. S-14054 (Alaska, Oct. 29, 2010) ("The Division could have changed its regulations to permit showing voters a list of names and party affiliation of write-in candidates. To do that however, it would be required to propose a new regulation, take public comment, and only then change the law.").

60. State, Div. of Elections v. Alaska Democratic Party, No. S-14054, slip op. at 4 (Alaska Oct. 29, 2010) (citing Alaska State Emps. Assoc./AFSCME Local 52 v. State, 990 P.2d 14, 19 (Alaska 1999)).

61. *Id.* at 4 ("The legislature's statutory mandate that the division assist voters who request assistance is paramount. Our decisions have consistently held that when a regulation conflicts with a statutory requirement, 'it is the regulation that must yield.'") (citation omitted).

62. *Id.* at 2.

63. *Id.* at 6.

64. *Id.*

65. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009). Although Hasen lists several types of laws for which the democracy canon might be usefully deployed, laws regulating voter assistance do not fall neatly

broadly construed in favor of letting voters have their votes cast and counted, and for letting candidates run in elections.<sup>66</sup> This way of interpreting statutes, according to Hasen, allows the greatest possible participation by voters and candidates alike—leading to the most “democratic” outcome.<sup>67</sup> In a footnote in the *Murkowski* opinion, the Alaska Supreme Court quoted its version of the canon, taken from *Carr v. Thomas*<sup>68</sup>: “In the absence of fraud, election statutes will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement, and to uphold the will of the electorate.”<sup>69</sup> As Hasen stresses in his article, the Alaska courts have traditionally adhered to a rather strong version of the democracy canon, by broadly construing election law statutes to prevent voter disenfranchisement at the ballot box.<sup>70</sup>

References to the democracy canon frame the supreme court’s analysis, though it is not clear that they do much actual work in the opinion itself. The opinion is largely guided by the rule that a statute will trump a regulation, as well as the court’s subsequent interpretation of that statute.<sup>71</sup> It is possible that the court used the democracy canon in

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into any of them. See *id.* at 83–84. There are few cases on this subject. See, e.g., *Smith v. Arkansas*, 385 F. Supp. 703 (E.D. Ark. 1974) (unmarried voter challenging on equal protection grounds statute that allowed spouse to aid voter in preparing ballot); *Morris v. Fortson*, 261 F. Supp. 538 (N.D. Ga. 1966) (write-in voters have right to bring in paper with correct spelling of candidate names); *O’Neal v. Simpson*, 350 So. 2d 998 (Miss. 1977) (whether all voters or only those who are blind, physically disabled or illiterate may receive assistance in marking their ballots); see generally 26 AM. JUR. 2D *Elections* § 309 (2010). The closest to the Alaska case was *Carter v. White*, 161 S.W.2d 525 (Tex. App. 1942), in which the court held that various types of assistance to write-in voters was permissible. There are of course cases under the Voting Rights Act dealing with illiterate voters, but these too rarely bring up the issue of voter assistance.

66. Hasen, *supra* note 65 at 76–77 (citing a collection of cases using the canon).

67. *Id.*

68. 586 P.2d 622 (Alaska 1978).

69. *Id.* at 626 n.11; *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054, slip op. at 3 n.4 (Alaska Oct. 29, 2010).

70. See Hasen, *supra* note 65, at 78–79 (discussing Alaska’s “particularly strong form” of the democracy canon); see also *Carr v. Thomas*, 586 P.2d 622, 626–27 (Alaska 1978) (“The right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constructions. If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms.”) (citing *Sanchez v. Bravo*, 251 S.W.2d 935 (Tex. Civ. App. 1952)). For a recent use of the democracy canon in Alaska, see *Anchorage v. Mjos*, 179 P.3d 941, 943 n.1 (Alaska 2008).

71. See *Alaska Democratic Party*, No. S-14054, at 4.

giving a liberal gloss to the Alaska statute at issue, that is, to give “assist” a broad meaning so that poll workers could do everything in their power to make sure a voter’s will is adequately expressed. However, it seems more correct to simply characterize the court’s decision as a case of ordinary plain-meaning statutory interpretation. “Assist” is potentially ambiguous, but not necessarily so. It is not too controversial that a commonsense interpretation of it would encompass providing a written list of write-in candidates to voters who specifically request assistance in casting a write-in ballot.

More salient in this regard seems to be the footnote in which the court discusses the historical change in the statutory language from specifying that only those who could not “read, mark the ballot, or sign his or her name” could request assistance to the more generic statement that *any* “qualified voter” could request assistance.<sup>72</sup> The history of changes to the statute seems telling in relation to how broadly the legislature intended the provision to be read: the direction of the legislative change was clearly toward favoring greater, rather than lesser, assistance to the voter by expanding the class of those eligible for assistance.<sup>73</sup> No appeal to the democracy canon was necessary to read the legislative history aright.

Finally, as I suggest in the next section, the supreme court could have rejected a strict reading of the regulation based on the fact that it would severely constrain poll works in the assistance they could have given to significantly disabled voters. That is to say, the supreme court could have upheld a broad reading of the assistance statute in order to avoid the possibility of “absurd results” that would result from a strict reading of the regulation.<sup>74</sup> It remains possible that this gave it an additional reason to assert the primacy of the statute over the regulation, and simply to reject the regulation as being determinative of the question of what assistance poll workers could give to voters.<sup>75</sup>

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72. *Id.* at 2 n.3.

73. *See id.*

74. *See* John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

75. *See* ALASKA STAT. § 44.62.030 (2010) (“A regulation adopted is not valid or effective unless consistent with the statute.”).

### III. WHAT COUNTS AS “ASSISTANCE”?

The supreme court’s opinion plainly seemed to leave open the question of what sorts of things *would* constitute permissible assistance beyond the provision of the list of write-in candidates.<sup>76</sup> It did not try to specify all the possible circumstances where providing a list of write-in candidates to a qualified voter would be appropriate.<sup>77</sup> In this respect, the opinion was narrow, and appropriately so. The Division had introduced a specific policy change in order to better assist voters, and the parties challenged that change. The court simply had to rule on whether that particular policy change violated Alaska law.

But it seems likely that the Division will now seek to make a more formal change to its regulations, in order both to remove the seeming contradiction between the new policy and the old regulation (which prohibited the distribution of any information about write-in candidates at polling places) and also to give guidelines to poll workers in the next election as to *when* the list may be permissibly shown to a voter. So a consideration of the broader question of voter assistance does not seem out of place.

So we can ask: To what extent *can* the state take steps to assist the voter in voting, and what steps should it take? As Pam Karlan has noted, the bias in the American context is to put a large share of the burden of voting on to the voter.<sup>78</sup> For instance, the state has no affirmative obligation to make sure its citizens are registered to vote: it merely has to eliminate unfair barriers to people ensuring their own franchise.<sup>79</sup>

This point was made clear in the recent litigation about laws passed in several states requiring that voters show photo identification in order to vote, as opposed to a utility bill or some other non-photographic form of identification. In Indiana, recent litigation focused on whether requiring voters to show photo identification prior to voting at polling places was too burdensome. In the Seventh Circuit decision *Crawford v. Marion County Election Board*,<sup>80</sup> Judge Posner dismissively wrote of those voters who could not be bothered to take the necessary steps to obtain

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76. See *Alaska Democratic Party*, No. S-14054, at 4.

77. *Id.* at 5–6.

78. Pam Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 920 (2007) (“By contrast to many other advanced democracies, the United States does not automatically enfranchise all eligible citizens. Rather, the burden remains on individual citizens to register.”).

79. *Id.*

80. 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

the required identification (steps Posner thought were reasonable to require).<sup>81</sup> For Judge Posner—and ultimately the United States Supreme Court—the burden was clearly on the would-be voters if they wanted to exercise their right to vote.<sup>82</sup>

A similar question of the division of the burden of the right to vote was present in the Murkowski litigation. If a voter wants to write in a candidate's name, does the burden of spelling the name properly rest wholly with the voter?<sup>83</sup> At one extreme, there is the view that the voter bears the burden either to memorize the correct spelling of the candidate's name or to bring a piece of paper with the name to the polling place.<sup>84</sup> Consistent with this view is the strict reading of the Division's regulation that no information about a write-in candidate can be provided or even mentioned at the polling place. A polling place worker may discuss only the mechanics of casting a write-in vote. But spelling the candidate's name is entirely up to the voter. If the voter wants to vote for a write-in candidate it is the voter's job—assisted perhaps by the write-in candidate herself—to make sure she has the information necessary to make her vote count.

Indeed, before the election, Lisa Murkowski recognized this burden. She deployed volunteers to distribute bracelets with her name spelled correctly; she made it a centerpiece of her ad campaign to show

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81. *Id.* at 951.

82. *See Crawford*, 553 U.S. at 202–04.

83. According to Christopher Elmendorf's useful categories, this question is another instance of the divide between liberals and conservatives about "access" versus "integrity." *See generally* Christopher Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1058–59 (2010). Conservatives will tend to put the burden on the voter for reasons of securing the integrity of the ballot whereas liberals will tend to give the voter the benefit of the doubt in order to maximize access to the ballot. *See id.* Here, the question was whether those voters who did not know how to spell Murkowski were at fault, such that they were not entitled to any special assistance at the polls. *See id.* at 1059 n.29 (discussing other cases of "voter fault").

84. *See State v. Sweeny*, 94 N.E.2d 785, 789 (Ohio 1950) ("The right of citizens to vote may not be denied or abridged, and, clearly, all qualified citizens have a right to vote even though they may suffer physical infirmities, illiteracy, feebleness of mind, ignorance or lack of information. *But the ability to mark and cast a ballot rests upon the individual voter.*") (emphasis added); *see also* *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196 (Ohio 1896) ("The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of any one; and, if any inequality arises, it arises, not from any inequality caused by the statute, but by reasons of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than for others. . . . But these difficulties inhere in the men themselves, and not in the law.").



her name being written correctly on a ballot.<sup>85</sup> And even if Murkowski did not engage in these efforts, surely voters could be counted on to engage in self-help: to get the correct spelling of her name from newspapers, or from the Alaska Division of Elections webpage. Or so runs the extreme view.

This view, placing the *entire* burden on the voter who wishes to vote by writing in a candidate's name, seems to overlook some cases of voter assistance which seem obviously legitimate, but which violate the strict letter of the Division's original regulation. In its brief and at oral argument, the Republican Party conceded that it would be permissible to assist a disabled voter who requested help in writing in the name of a candidate.<sup>86</sup> At that point, the poll worker could legitimately ask the voter for the name of the candidate, and upon hearing the answer, confirm that this indeed was the candidate the voter wished to vote for. The poll worker could then write-in the name of the candidate on the ballot, spell it correctly, and fill in the appropriate oval.

On the extreme view, this might seem to amount to providing information of a write-in candidate by a poll worker, and so be prohibited.<sup>87</sup> After all, the poll worker has provided the *correct spelling* of

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85. Sean Cockerham, *Write-Ins Favor Murkowski; Miller Won't Quit*, ANCHORAGE DAILY NEWS, Nov. 3, 2010, <http://www.adn.com/2010/11/02/1532963/senate-drama-could-just-be-beginning.html> ("Murkowski] spent over \$1 million telling voters to 'fill it in, write-in' after she lost to Miller in the Aug. 24 Republican primary. . . . She distributed rubber bracelets with her name on it, t-shirts, even temporary tattoos."); Cockerham & Bolstad, *supra* note 1 (Murkowski saying Alaskans are "going to have to learn to spell my name"); Kyle Hopkins, *Murkowski Proclaims Herself the Victor*, ANCHORAGE DAILY NEWS, Nov. 17, 2010, <http://www.adn.com/2010/11/17/1560285/murkowski-proclaims-herself-the.html>.

86. See Alaska Republican Party's Opposition to Petition for Review at 5-6, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Oct. 29, 2010) ("All of this leaves plenty of room for genuine assistance. There is nothing, for instance, which would prevent the following conversation: Voter: I need some help here. Official: What help do you need? Voter: I need help writing in a candidate for Senate. Official: No problem, I can help you do that. Who do you want to write-in? Voter: Lisa Murkowski. Official: Okay, do you need me to write it in for you? Voter: Yes. Official: Alright, I've written it on the line and darkened the oval. Do you need any other help?"). A similar distinction between offering information and (merely) giving assistance seems to have been made by the Ohio Supreme Court in *Sweeny*, 94 N.E.2d at 790 (holding that aid to illiterate voters "is intended to be mechanical in marking the ballot and not informative in the choice of candidates") (emphasis added).

87. The attorney for the Democratic Party may have advanced what I have been calling the "extreme" view at oral argument. Oral Argument at 36:00, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) (seeming to suggest that even the correct spelling of a candidate's name is "information" regarding a write-in candidate and therefore poll workers would

the candidate's name to the voter. If we took the extreme view seriously, the poll worker could only inform the voter of the mechanics of writing in the name of a candidate, and *nothing* about the candidate and how to spell her name. On this view, the poll worker would ultimately have to *ask the voter* how to spell the name of the candidate and then write it in exactly as the voter spelled it.<sup>88</sup> But just as the paradigmatic case of prohibiting discussion of write-in candidates would be posting signs advertising a write-in candidate in the polling place, so too it seems that there is a paradigm case of assisting voters when it comes to write-in candidates: helping a disabled voter write in the name of the candidate of his or her choosing (which might include, *inter alia*, spelling the name correctly and confirming orally with the voter that the name written was indeed the name of the candidate she wished to vote for).

Once this core case is conceded, then it becomes hard to draw a principled line that would make supplying a list of write-in candidates impermissible. If a poll worker can write the name of a candidate for a voter, spelling the name correctly, on what grounds could the poll worker not simply *tell* a voter how to spell the name of a candidate if asked?<sup>89</sup> And if the poll worker could *tell* a voter how to spell a candidate's name correctly, why could a poll worker not *show* the correct spelling of the name to the voter? Put more generally, how do we differentiate the quintessential case of voter assistance (e.g. assisting a disabled voter to write in the name of a candidate) and a case where a voter simply needs help in spelling the name of a candidate but can write in the candidate's name herself? Any lines here seem to be more easily based on issues of cost and administrative convenience, not on principle.

There are actually two analytically separate issues here. First, there is a simple question of how best to interpret the statute. As noted above, the Alaska statute governing voter assistance does not limit the ability to request and to receive assistance solely to those who have a visible

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be prohibited from giving it to voters). The attorney for the Republican Party noted his disagreement with this apparent position of the Democratic Party. Oral Argument at 42:45, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) (stating that it is permissible for election officials to convey the correct spelling of a candidate's name to a voter who requests assistance).

88. This way, the correct spelling of the name would not be conveyed to the voter.

89. This point was noted by the Alaska Division of Elections at oral argument. Oral Argument at 14:00, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) ("If the name is information, why isn't how you spell the name information?").

disability. It *used* to have such a restriction, but now no longer does: the class of people who can request and receive assistance now extends to the class of all qualified voters.<sup>90</sup> Alaska law makes no distinction between the disabled voter who needs assistance and the merely forgetful or absent-minded voter, who might have the name of the candidate on the tip of his tongue. If the former can get help, there does not seem to be a principled way in the statute to not provide help to the latter. The supreme court, in its opinion, grouped together those with learning disabilities and those with memory problems and those who merely had trouble spelling.<sup>91</sup> This seems right, given the broad wording of the revised statute.<sup>92</sup>

But if this is the case, then this raises a second question, which seems more a question of pragmatics than of principle. How can the Division of Elections best assist those voters who need help writing in the name of a candidate, without unduly influencing either the voter requesting assistance or any other voter? The Division seems to have simply made the choice that it would be less disruptive to offer those wishing assistance in writing in a vote a list of all write-in candidates—either because voters forgot who was running as a write-in candidate, or because they did not know how to spell a candidate’s name.<sup>93</sup> Having to physically help each voter who requested assistance in spelling a name (as the Republican Party seemed to suggest) might have been more time consuming and more disruptive than simply giving interested voters a list of names and leaving it to the voter to correctly fill in the name of the candidate (especially in a race where many voters could be anticipated to vote write-in<sup>94</sup>). It would also risk a non-uniform approach to assisting voters: different poll workers might have different ways of

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90. See *supra* notes 72–73 and accompanying text.

91. See State, Div. of Elections v. Alaska Democratic Party, No. S-14054, slip op. at 4–5 (Alaska Oct. 29, 2010) (“Some voters require assistance for medical difficulties . . . [s]ome voters suffer from learning disabilities . . . some voters may need assistance remembering or spelling the name of a candidate due to conditions impacting their memory or comprehension . . .”).

92. *Id.* at 2–3 n.3.

93. See Addendum to Petition for Review for State of Alaska at 2, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) (“[T]he list provides the simplest and least intrusive means of providing . . . assistance consistently to all voters.”).

94. Bolstad, *supra* note 25 (noting the Division of Election’s “anticipation that [there would] be an unprecedented number of questions about Sen. Lisa Murkowski’s write-in bid”).

helping voters.<sup>95</sup> Indeed, there seems to be a heightened risk of influence when a polling worker *actually goes into* the voting booth to help a person vote,<sup>96</sup> rather than simply providing the voter with a list when she asks how to spell a certain candidate's name.

It is again hard to say that there is an obviously *principled* reason why a conversation about how to spell the name of a candidate would be less disruptive than handing out a list of all candidates to the voter who requested help in spelling the name of a candidate.<sup>97</sup> The Division chose to go for a wholesale approach—lists given to voters who need help—rather than a retail approach—individual, non-uniform, and labor-intensive assistance to voters in marking their ballots. In other words, the statute requires assistance, and it was the Division's pragmatic choice to go with a list rather than with any of the other available means.<sup>98</sup>

At oral argument, the Republican Party suggested that when a person asks a poll worker how to spell a specific name, and when the poll worker responds, this is not giving "information" because the poll worker has been prompted by the voter.<sup>99</sup> The superior court decision

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95. Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 20, *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI (Alaska Sup. Ct. Oct. 27, 2010).

96. This was a worry about the early assistance provision, i.e., would helping voters mark their ballot violate the secrecy of the ballot? *See* 1996 ALASKA OP. ATTY. GEN. 91, USE OF ELECTRONIC TRANSMISSION IN ABSENTEE VOTING, 1996 WL 148628, at \*2-3 (1996) (considering legislative debates about the importance of secrecy of the ballot and whether it was an unqualified right).

97. Addendum to Petition for Review for State of Alaska at 2-3, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) (expressing concern that if the list is not allowed, poll workers "will have to spell the name aloud, which may be overheard by other voters").

98. The political parties did raise legitimate concerns about the inadequate training—basically none—the Division of Elections gave poll workers about how and in what circumstances to use the list. *See, e.g.*, *Alaska Democratic Party's Opposition to Petition for Review* at 7-8, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) ("The Division's last-minute, unannounced change to Alaska's election procedures . . . has not given poll workers sufficient education and training about the proper method and procedure to use when asked for the write-in list."). *But see* Addendum to Petition for Review for State of Alaska at 3, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) ("[A]sking the poll workers in hundreds of locations with varying levels of sophistication to determine what constitutes a valid request for spelling help, and for what candidate, opens the election to challenge based on either the provision of too much or not enough assistance.").

99. The Republican Party suggested the "bright line" rule that the voter must always prompt the poll worker with the name of the candidate. Oral Argument at 54:45, *State, Div. of Elections v. Alaska Democratic Party*, No. S-

likewise sought to draw a line between giving a list that prompts the voter regarding whom he or she might vote for, and the voter asking how to spell a name, where the voter prompts the election worker about the spelling of a particular candidate's name.<sup>100</sup> But this distinction seems to collapse on closer inspection. For even in the case where the list is provided, the voter will still have to ask for the list and will still have to pick the name from the list and write down that name in the appropriate place on the ballot.<sup>101</sup> The burden is still on the voter to make the actual choice of whom to vote for: the list does not "suggest" any candidate should receive the voter's vote.<sup>102</sup> There is no undue influence at any point in the process where it might threaten the integrity of the vote. In fact, there may be a greater risk of influence in the person who asks for help in spelling the name of a candidate but does not specify which one, and an overeager poll worker, rather than simply handing over a list of names may say, "Oh yes, I can help you spell *Murkowski*."

#### IV. CAN THE STATE DISFAVOR WRITE-IN CANDIDATES?

If the goal is merely to help give effect to a voter's intent—something the supreme court said was foremost in its mind in making its decision in *Alaska Democratic Party*—then it is plausible to say that giving voters the list does this in an arguably unobtrusive way.<sup>103</sup> The voter gets the list, finds the candidate's name on the list, and writes it in. But there was possibly another purpose in the Division's original regulation: to disfavor write-in candidates generally. Obviously, if that

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14054 (Alaska Oct. 29, 2010). It conceded that this might rule out assistance for a stroke victim who could not remember the name of the candidate he or she wished to vote for. *Id.*

100. *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI, slip op. at 10 (Alaska Sup. Ct. Oct. 27, 2010).

101. See Bolstad, *supra* note 25 (quoting the attorney for the Alaska Division of Elections, Margaret Paton-Walsh, saying the list is "just names on a piece of paper. . . . The voter still has to pick a candidate. The list doesn't tell them which candidate to pick. It merely helps them identify the candidate they want to vote for.").

102. *Contra* Alaska Republican Party's Opposition to Petition for Review at 7, No. S-14054 (Alaska Oct. 29, 2010) ("Suggesting who to vote for is the bright line which the law, as currently written draws. The Division, and the courts, would cross it at the peril of opening up opportunities for electioneering at the polling places.").

103. *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054, slip op. at 3 (Alaska Oct. 29, 2010).

was the goal, the unprecedented move of offering a list of write-in candidates would defeat this purpose.

Why would a state want to limit the success of write-in candidates? One possible reason is that it is much more efficient to have voters simply vote for the candidates pre-printed on the ballot than to have them write in a candidate. Votes for candidates already on the ballot can be counted by machine, whereas write-in ballots can only be counted by hand—which takes time and costs money (as Alaska subsequently found out).<sup>104</sup>

But there may also be a more principled reason or reasons. Alaska has a primary in order to focus the electorate on the candidates who actually represent a party and who, presumably, have a plausible, if not the best, shot at winning statewide support. The reward for winning a party's primary is not only that a candidate gets the party's backing (something that, given Murkowski's entry, was only ambivalently extended to Miller), but also gets to have his or her name printed on the ballot. A consequence of *not* winning a party's primary is that the only way a candidate can win the general election is by conducting a write-in campaign. The state might legitimately want to favor candidates who have the support of the major parties and to discourage "sore losers" from causing mischief and mounting write-in candidacies—either when they have lost the primary, or decided to sit the primary out.<sup>105</sup>

In the United States Supreme Court case *Burdick v. Takushi*,<sup>106</sup> the Court held that the state had an interest in "channeling expressive activity at the polls"<sup>107</sup> and could do so by limiting write-in candidacies.<sup>108</sup> The goal of an election, the Court held, is not merely to give voters a chance to voice their opinions, as if the polling place were

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104. See Richard G. Niemi & Paul S. Herrnson, *Beyond the Butterfly: The Complexity of U.S. Ballots*, 1 PERSP. ON POL. 317, 322 (2003) ("One can only imagine the difficulties involved [with write-in ballots] if many thousands, let alone millions, of voters wrote in a name for some election. Beyond deciphering the handwriting, difficulties would arise over what spellings would be allowed, whether voters had to include a first and last name, and so on.").

105. At oral argument before the Alaska Supreme Court, counsel for the Republican Party also defended the primary system on seemingly contrary grounds, as making "dark horse" candidacies possible. See Bolstad, *supra* note 25 ("There's a reason for the primary system," he said. "The primary system makes it easier for dark horses, for people who don't have a lot of money but a lot of time and are willing to put in the effort, to have a shot. It makes it less likely that people can win a [s]eat with a small plurality, so they're more likely to try to build consensus with people in their district of state.").

106. 504 U.S. 428 (1992).

107. *Id.* at 438.

108. *Id.* at 438-39.

merely a more formal alternative to shouting on the street corner.<sup>109</sup> Accordingly, the state does not have to count a vote for Donald Duck in the overall election tally, even if the voter wants to express an opinion that he or she would sooner elect a cartoon character than any real candidate. The state's interests in avoiding unrestrained factionalism or party raiding outweigh the interests of the voter.<sup>110</sup> Alaska's own statute requiring that write-in candidates register as candidates five days before the election,<sup>111</sup> while not a ban on write-in candidacies, also has the effect of channeling expressive activity. You can write in a protest vote for Mr. Duck, but it will not be counted toward the results. Because Donald Duck presumably was not registered as a write-in candidate in Alaska, any votes for him would simply be tossed out.

But how far can states go in regulating legitimate write-in candidacies in order to "channel" voter's "expressive activity"? In *Burdick*, the state disallowed write-in votes at both the general and primary elections.<sup>112</sup> The United States Supreme Court held that this was permissible,<sup>113</sup> in part because it was rather easy (the Court thought) to get on the primary and general election ballots in Hawaii,<sup>114</sup> and also because of the state's interest in limiting "sore loser" candidacies, i.e., candidacies by those like Murkowski who lost the primary but wanted a second chance in the general election.<sup>115</sup> Of course, Alaska does not prohibit write-in votes and subjects write-in ballots to the rather mild constraint that voters can only write in the names of candidates who have officially declared their write-in candidacy five days before the election.<sup>116</sup> In Alaska, over 150 candidates ended up running for the Senate seat, thanks to the urgings of an Anchorage disc jockey, who wanted to foul up Murkowski's chances.<sup>117</sup> The ease with which they were able to register demonstrates how low the barrier to entry was for Alaska's write-in candidates.

Could Alaska have asserted its interest in limiting third-party write-in candidates at the general election by limiting the amount of

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109. *Id.* at 441-42.

110. *Id.* at 439.

111. See ALASKA STAT. § 15.25.105(c) (2010).

112. See generally HAW. REV. STAT. §§ 11(1)-12(42) (2010).

113. *Burdick*, 504 U.S. at 440 ("Legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters.").

114. See Elmendorf, *supra* note 83, at 1086 n.157 (minimal barriers to getting on primary ballots were a key part of *Burdick* decision).

115. See *Burdick*, 504 U.S. at 440.

116. ALASKA STAT. § 15.25.105 (2010).

117. Hopkins, *supra* note 43.

assistance voters could have in writing in the names of candidates? It could have, but it did not. Instead, it was left to the Republican Party to raise the issue that primaries have the function of “winnow[ing] down” the choice of candidates, and that the losers of party primaries should not be able to get a second bite at the apple.<sup>118</sup> In other words, the Republican Party asserted that the restriction on assistance to those wishing to write in a candidate’s name might be a legitimate barrier set up by the state. If the state could ban write-in candidacies in some instances, could it not make it harder for voters to vote for a non-primary winner?<sup>119</sup> Or, to put it slightly more polemically, could the state not legitimately hold that a candidate who has lost the primary election has the burden to make sure voters spell her name correctly on the ballot?

The Alaska Supreme Court did not rule directly on this issue, even though it was raised by the Republican Party. There are two reasons the court did not rule on this issue, one procedural and one substantive. The procedural reason is simply that the State itself did not choose to advance this interest. The State, as represented by the Division of Elections, advocated the exact opposite side of the issue: the State wanted to give full effect to the voter’s intent, even if the voter’s intent was to write in a candidate. The point was simply not as persuasive when raised by a party against the state. With that procedural posture, it may have simply looked as if the party was trying to manipulate the rules in order to give itself an advantage over the spoiler candidate.<sup>120</sup>

Second, and more damning from this perspective, the Republican Party could offer no legislative history to the effect that the State *meant* to limit voter choice by means of the regulation prohibiting the distribution of information on write-in candidates.<sup>121</sup> Given this lack of evidence as to the State’s purpose, it would have been odd for the

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118. Alaska Republican Party’s Opposition to Petition for Review at 8–10, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010) (citing “good public policy reasons” to have a primary system that “winnow[s] down” the number of candidates on the ballot in the general election).

119. In other words, does the greater power not include the lesser?

120. Of course (as in many election law cases), accusations of bad faith could be made equally by both sides. Murkowski’s side could be charged with favoring a lenient position in helping voters because they stood to benefit from it.

121. The attorney for the Republican Party conceded this point at oral argument. Oral Argument at 48:45, State, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010); *id.* at 1:00:30 (admitting the rationale of excluding non-primary winners was “speculative”).



supreme court to turn around and protect the State from its own expressed position in the litigation. And it would have been even odder for the court to rule in a way that limited the expression of voter intent, especially when the State was on the side of helping the voters.

In the end, the Alaska Supreme Court probably felt that the larger issue of the rights of write-in candidates could safely be prized apart from the issue of to what extent the state is able to assist the voter. When a voter asks for assistance in voting for a candidate, the proper inquiry is what the state can permissibly do to help *that voter* in voting for his or her candidate of choice. Larger questions concerning the limits that states may put on write-in candidacies should appropriately recede into the background. At this point, it seems that the state's efforts to make it harder for write-in candidates to succeed—say, by limiting eligibility for the list of write-in candidates—have already done whatever work they were meant to do. The write-in candidate, after all, is hugely disadvantaged by the mere fact that her name is not printed on the ballot. But at the point when the voter asks for help, the question is no longer what more the state can do to limit the voter's choice, but to what extent the state can permissibly assist the voter in making his or her choice. To limit voter choice at this point in the process, there would need to be a fairly clear indication that this was the state's intent. The Republican Party failed to offer any evidence that it was.

## V. FROM ASSISTANCE AT THE POLLS TO COUNTING THE VOTES

In the end, Lisa Murkowski won the Senate election<sup>122</sup> despite Miller's challenges to many write-in ballots. Indeed, Murkowski's margin over Miller was so great that she would have won without any of the contested ballots.<sup>123</sup> Miller's post-election challenge to Murkowski's victory, unlike his challenge regarding voter assistance, seemed doomed from the start, and none of the courts hearing Miller's case were sympathetic to Miller's pleas.<sup>124</sup>

Still, Miller's post-election legal challenge relied on a strict reading of an Alaska statute. In this case, the Alaska statute at issue says that

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122. See *Miller Concedes Loss to Murkowski*, *supra* note 2.

123. This raised the question whether the case was moot from the beginning, as was argued early on by the State. Memorandum in Support of State's Motion for Summary Judgment on All Counts at 8, *Miller v. Campbell*, No. 4FA-10-3151CI (Alaska Sup. Ct. Nov. 29, 2010).

124. See *Miller v. Campbell*, No. 1JU-1-1007CI (Alaska Sup. Ct. Dec. 10, 2010); see also *Miller v. Treadwell*, 736 F. Supp. 2d 1240 (D. Alaska 2010); *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

only those ballots that have Murkowski's last name spelled correctly can be counted as legitimate. The statute prescribes that a vote for a write-in candidate shall be counted "if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided."<sup>125</sup> On Miller's reading of the statute, the ballots cannot have a wrong first name, and they cannot have any *other* information written in on the line, such as "Republican."<sup>126</sup> Voters also must spell "Murkowski" exactly right. Miller challenged every ballot which departed from his strict reading of the provision; and this reading, it must be said, is no more or less plausible than a more liberal interpretation of the statute.<sup>127</sup> The state, however, said that it will count any ballot where the voter's intent is clear, even if the spelling wasn't perfect.<sup>128</sup> The ultimate correctness of Miller's interpretation of the Alaska standard for counting write-in ballots is not my main concern here. That task lies for a later article.<sup>129</sup> My question now is whether the fact that the Alaska Supreme Court ruled against Miller (and the two

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125. ALASKA STAT. § 15.15.360 (2010).

126. Becky Bohrer, *Murkowski Camp Cries Foul in Ballot Count*, YAHOO! NEWS, (Nov. 11, 2010, 6:53 PM), [http://news.yahoo.com/s/ap/20101111/ap\\_on\\_el\\_se/us\\_alaska\\_senate](http://news.yahoo.com/s/ap/20101111/ap_on_el_se/us_alaska_senate) (noting challenges to ballots that "appeared to have" Murkowski's name spelled correctly, although the L in Lisa was in cursive, or where the vote read "Lisa Murkowski Republican").

127. See generally Complaint for Injunctive and Declaratory Relief, *Miller v. Campbell*, 736 F. Supp. 2d 1240 (D. Alaska 2010) (No. 3:10-cv-0252-RRB), 2010 WL 4655332; Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof, *Miller v. Campbell*, 736 F. Supp. 2d 1240 (D. Alaska 2010) (No. 3:10-cv-0252-RRB).

128. See Complaint for Injunctive and Declaratory Relief at ¶16, *Miller v. Campbell*, 736 F. Supp. 2d 1240 (D. Alaska 2010) (No. 3:10-cv-0252-RRB), 2010 WL 4655332 (citing instances in the popular media that the Alaska Division of Elections planned to use an "intent of the voter" standard); Becky Bohrer, *Miller Says Absentee Votes May Turn Tide as Count Continues*, ANCHORAGE DAILY NEWS, Nov. 14, 2010, <http://www.adn.com/2010/11/13/1552772/murkowski-continues-to-win-most.html> ("[T]he state has been using discretion in determining voter intent, pointing to prior case law as the basis for this"). But cf. Sean Cockerham, *Murkowski Confident as Write-In Tally for Senate Continues*, ANCHORAGE DAILY NEWS, Nov. 12, 2010, <http://www.adn.com/2010/11/11/v-printer/1550305/murkowski-confident-as-tally-grows.html> (Miller spokesman arguing that Alaska "does not have a voter intent law"); Sean Cockerham, *Murkowski Confident as Write-In Tally for Senate Continues*, ANCHORAGE DAILY NEWS, Nov. 12, 2010, <http://www.adn.com/2010/11/11/v-printer/1550305/murkowski-confident-as-tally-grows.html> (quoting Director of Division of Elections saying, "If I can pronounce the name by the way it's spelled, that's the standard I'm using").

129. See Chad Flanders, *Veil of Ignorance Rules in Election Law* (unpublished manuscript) (on file with author).

major parties) in the litigation regarding voter assistance should matter as to whether we should strictly construe the Alaska statute about counting write-in ballots.

The argument would go something like this.<sup>130</sup> The Alaska Statute providing that poll workers may assist voters has been read to allow poll workers to give a list of the eligible write-in candidates, which has the correct spelling of the candidates' names. Given this, there is simply no excuse for the voter if he or she misspells the name of the candidate—no reason election officials after the election should have to struggle to discern the voter's "intent." Not only could the voter have educated herself prior to voting (and even brought in a slip of paper with the correct spelling), she could have *requested the correct spelling* of the candidate's name at the polling place itself. Accordingly, when looking at the ballots themselves, any errors should be construed against the voter—or assumed to be deliberate, protest votes.<sup>131</sup>

There are two problems with this argument. The first is that there can be, and probably was, a gap between what the Division of Election allows and what voters have adequate notice of. Just because poll workers are *able* to help voters who cannot properly spell the name of their candidate does not mean that those voters will always avail themselves of that help or even know that they can be assisted. Poll workers still have to be prompted to help. Further, given that the permissibility of the new Division policy was only confirmed days before the election<sup>132</sup> voters could legitimately claim that they did not

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130. A justice raised a version of this point at the oral argument, albeit running it the other way. Oral Argument at 10:41, *State, Div. of Elections v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010) (asking whether the fact that the standard for counting the ballot after the fact is "intent of the voter" solves any worry about voter assistance prior to the ballot being marked). And, in fact, the Miller campaign did make this argument in the actual litigation. See *Miller v. Campbell*, No. 1JU-10-1007CI, slip op. at 16 (Alaska Sup. Court, Dec. 10, 2010) ("The only support Miller provides for his interpretation of [section 15.15.360 of the Alaska Statutes] is based on the nature of Murkowski's campaign. Miller argues that Murkowski went to great lengths to advise voters of the spelling of her name and to make it as easy as possible for voters to get her name right. He points to the fact that lists of write-in candidates were posted at polling places and that voters could ask for assistance."); Complaint for Injunctive and Declaratory Relief at 8-9, *Miller v. Campbell*, No. 4FA-10-3151-CI (Alaska Sup. Ct. Dec. 10, 2010).

131. Complaint for Injunctive and Declaratory Relief at 8-9, *Miller v. Campbell*, No. 4FA-10-3151-CI (Alaska Sup. Ct. Dec. 10, 2010) (noting potential inconsistency between Division of Election's position that assistance to the voter is necessary to make sure there are no spelling errors *and* favoring a liberal "intent of the voter" standard when reading ballots).

132. von Spakovsky, *supra* note 19.

know that there was help and that they were supposed to ask for help if they had any doubt about how to write in their candidate's name.

The second problem with the argument for construing marked ballots strictly abstracts from any problem peculiar to this year's election in Alaska. Put simply, there is no reason why a liberal standard for voter assistance *compels* a strict standard for reading the ballots, just as there is no reason why a liberal standard for reading ballots compels a strict standard for assisting voters. In fact, if the principle that governs elections in Alaska is to follow the intent of the voter when this is readily ascertainable, then this would suggest a liberal standard *both* at the assistance stage *and* at the vote counting stage.<sup>133</sup> Each stage must be examined independently, and whatever will best facilitate divining the intent of the voter at each stage – and making that intent manifest in an actually counted ballot – should be favored.

### CONCLUSION

Based on the above analysis, I conclude that the Alaska Supreme Court probably reached the correct result in *State, Division of Elections v. Alaska Democratic Party*. The regulation, though clear, seemed to countenance an extreme restriction on poll workers' ability to assist voters, something that the Division of Elections was under a statutory mandate to do. The supreme court was on firm ground in reading the statute to allow the Division to help voters by making a list of write-in candidates available to those who either requested it or made a request to which the list would be an appropriate response.

This decision left open many issues. The supreme court listed *some* circumstances where providing the list would be appropriate but did not prescribe which questions should prompt the giving of the list. The Division should, and no doubt will, try to clarify the rules regarding the provision of a list of write-in candidates. These steps might make it harder to become a write-in candidate to avoid the deluge of names that accompanied the last election. In any event, there remains much work to be done, and the Alaska Supreme Court gave the Division room in its decision to do that work.

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133. Indeed, the supreme court said something close to this in resolving the later case. See *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010) (noting that the court has "consistently construed election statutes in favor of voter enfranchisement"); see also *id.* at 869–70.